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EQUITY CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT

4647

OF

NORTH-CAROLINA,

FROM

JUNE TERM, 1828,

TO

DECEMBER TERM, 1830.

BY THOMAS P. DEVEREUX,

REPORTER, &c.

VOL. I.

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TABLE

OF

THE NAMES OF CASES

REPORTED IN THE FIRST VOLUME.

The letter v. follows the name of the Plaintiff.

A.

Allen v. Buncombe T. Co. page 119
Alley v. Ledbetter, 449
Alston v. Outerbridge, 18
" v. Foster, 337
" Wynne v. 163
" Dawson v. 396
Applewhite, Thompson v. 460
Arendell v. Blackwell, 354
Armstead, Pike v. 110
Arnett v. Linney, 369
Att'y. General v. Hunter, 12

B.

Bagwell, Sharpe v. 115
Bailey v. Shannonhouse, 416
Barnes v. Dickinson, 326, 273
Barringer, Wood v. 67
Battle, Harrison v. 537
Beattie, White v. 87, 320
Benzein v. Lenoir, 225
" v. Robenett, 444
Blackledge v. Nelson, 418
Blackwell, Arendell v. 354
Blount, Ryan v. 382
Booe, Cheshire v. 22
Bostion, Lunsford v. 483
Branson, Kennon v. 64
" v. Yancy, 77
Branton, Green v. 500
Brown, Nesbit v. 30
Bryan v. Bryan 47
Bufferlow, Newsom v. 379
Buncombe T. Co. Allen v. 119

C.

Cannon v. Jenkins, 422
Cheshire v. Booe, 22
Cobb, Keaton v. 439
Coffield, Ward v. 108
Collier v. Collier, 352
" v. Poe, 55
Cooke v. Streator, 324
Cotton, Norfleet v. 334
Cowan, Davidson v. 470
Cowles, Haines v. 420

D.

Dalton, Kirby v. 195
Davidson v. Cowan, 470
Davis, Kimbrough v. 71
Dawson v. Dawson, 93
" v. Alston, 396
Dickins, Taylor v. 71
Dickinson, Barnes v. 273, 326
Donaldson v. State Bank, 103
Dozier's Heirs, 118
Dudley, Smith v. 354
Duncan, Scott v. 403
Dunn v. Holloway, 332

E.

Eaton, Field v. 283
Ellis v. Ellis, 180, 341, 398
Ely, Stevens v. 493

F.

Field v Eaton, 283
Fleming, Liles v. 185
Flintham v. Holder, 345
Foster, Alston v. 337

G.

Gillett, Spear v. 466
Gomez v. Lazarus, 205
Grant v. Pride, 269
Green v Branton, 500
" Jourdan v. 270

H.

Haines v. Cowles, 420
Hall, Woods v. 411
Harman, Petty v. 191
Harrison v. Battle, 537
Helme, Williams v. 151
Henderson v. Wilson, 309, 276
Hester v. Hester, 328
Holder, Flintham v. 345

Holloway, Dunn v. page 322
Hooks v. Sellers, 61
Hunt, Morehead v. 35
Hunter, Att'y. General v. 12
Huson v. McKenzie, 463
Hylton, Moore v. 429

I.

Iredell v. Langston, 392
Ives v. Sumner, 338
Ivy v. Rogers, 58

J.

Jasper v. Maxwell, 357
Jeffreys, Jones v. 492
" v. Yarbrough, 506
Jenkins, Cannon v. 422
Johns, Pickett v. 123
Johnson v. Person, 364
Jones v. Jeffreys, 492
Jourdan v. Green, 270

K.

Keaton v. Cobb, 439
Kennon v. Branson, 64
Kimbrough v. Davis, 71
Kirby v. Dalton, 195
Kirk v. Turner, 14

L.

Langston, Iredell v. 392
Lazarus, Gomez v. 205
Ledbetter, Alley v. 449
Lee v. Norcom, 372
Leigh, Mardre v. 360
Lenoir, Benzein v. 225
Liles v. Fleming, 185
Linney, Arnett v. 369
Lunsford v. Rostion, 483

M.

Maberry, Martin v. 169
Mardre v. Leigh, 360
Martin v. Maberry, 169
Maxwell, Jasper v. 357
McAuley v. Wilson, 276
McCabe v Spruill, 189
McCannon, Poindexter v. 373
McKenzie, Huson v. 463
McNair v. Ragland, 516, 533
Moore v. Hylton, 429
Morehead v Hunt, 35

N.

Nailing, Peace v. 289
Nelson, Blackledge v. 418
Nesbit v. Brown, 30
Newsom v. Bufferlow, 379
Norcom, Lee v. 372
Norfleet v. Cotton, 334

O.

Organ Meeting House v. Seaford, 453
Outerbridge, Alston v. 18

P.

Peace v. Nailing, 289
Person, Johnson v. 364
Petty v. Harman, 191
Pickett v. Johns, 123
Pike v. Armstead, 110
Poe, Collier v. 85
Poindexter v. McCannon, 373
Pride, Grant v. 369

R.

Ragland, McNair v. 516, 538
Reeves v. Reeves, 386
Ricks v. Williams, 3
Robenett, Benzein v. 444
Rogers, Ivy v. 58
Ryan v. Blount, 382

S.

Scales, Wall v. 472
Scott v. Duncan, 403
Seaford, Organ Meeting House v. 453
Sellers, Hooks v. 61
Shannonhouse, Bailey v. 416
Sharpe v. Bagwell, 115
Simms v. Thompson, 197
Smith v. Dudley, 314
" v. Smith, 173
" v. Washington, 318
Spear v. Gillet, 466
Spruill, McCabe v. 189
Stallings v. Stallings, 208
Stanly v. Stocks, 314
State Bank, Donaldson v. 103
Stevens v Ely, 493
Stocks, Stanly v. 314
Streator, Cooke v. 324
Sumner, Ives v. 338

T.

Taylor v. Dickins, 71
" v. Vick, 274
Thompson v. Applewhite, 460
" Simms v. 197
Tolar v. Tolar, 456
Tunstall, Wynne v. 23
Turner, Kirk v. 14

V.

Vick, Taylor v. 274

W.

Wall v. Scales, 472
Ward v Coffield, 108
Washington, Williams v. 137
" Smith v. 318
White v. Beattie, 87, 320
Williams v. Helme, 151
" v. Ricks, 3
" v. Washington, 137
Wilson, Henderson v. 309, 276
" McAuley v. 276
Wood v. Barringer, 67
Woods v. Hall, 411
Wynne v. Alston, 163
" v. Tuntstall, 23

Y.

Yarbrough, Jeffreys v. 506
Yancy, Branson v. 77

Dec. 1826.

IN EQUITY.

Micajah Ricks, and Milberry his wife
Thomas and Teakle Ricks,
vs.
Pilgrim L. Williams and Wilson Taylor, Executors of Rowland Williams.
} From Nash.

The same Defendants as Plaintiffs,
vs.
The same Plaintiffs as Defendants.

In a devise of personalty, to be "equally divided between my son P, my daughters D, C, and E, and the heirs of my daughter P," held, that the latter take but one-fifth among them.

A petition for a rehearing is the proper remedy against an interlocutory decree.

Rowland Williams, by his will, after sundry specific legacies, devised all the residue of his estate to be sold, "and the money to be divided equally, between my son *Pilgrim L. Williams*, and my daughters *Diana*, *Charity* and *Elizabeth*, and the lawful begotten heirs of the body of my daughter *Priscilla*."

The Plaintiff *Milberry* is the daughter, and the Plaintiffs *Thomas* and *Teakle*, the grandsons of *Priscilla*, and claim to have the residue divided into seven equal parts.

On the Spring Circuit of 1821, his honor Judge *Nash*, by an interlocutory decree, directed the residue to be divided according to the prayer of the bill. A bill of review, and a petition for a rehearing were filed, and the cause stood in this Court upon the original bill, and the bill of review, both having been transferred to this Court.

This case was twice argued, viz: at December Term, 1824, and at December Term, 1825, a note of which, the present reporters have been furnished with.

Gaston against the decree.—*Rowland Williams* bequeaths as follows: "I leave the rest of my estate to be

Dec. 1826.

Ricks et al. v. Williams.

Williams v. Ricks et al.

sold, and the money to be equally divided between my son *Pilgrim*, and my daughters *Diana*, *Charity* and *Elizabeth*, and the lawful begotten heirs of my daughter *Priscilla*." *Priscilla* was then dead—had left surviving, and who were living at testator's death, a daughter, *Milberry Ricks*, and two grandsons, *Thomas* and *Teakle Ricks*, children of a deceased son.

The decree ordered a division, *per capita*, between *Pilgrim*, *Diana*, *Charity*, *Elizabeth* and *Milberry*, *Thomas* and *Teakle*.

It was erroneous:—

1. If the words "lawful begotten heirs of my daughter *Priscilla*," are sufficiently definite of themselves, without reference to the statute of distributions, to point out the objects of testator's bounty, they designate her *children*, and her two grandsons are not embraced within them.

These words "heirs of the body," or "heirs lawfully begotten of a certain person," when used as words of purchase, and especially in gifts of chattles, are synonimous with "children."

It is so often in dispositions of real property, see *Doe Dem. Long* v. *Laning*, (2 *Burr.* 1106,) and *Goodlittle* v. *Herring*, (1 *East.* 264.)

It is their established meaning in bequests of personalty. (*Loveday* v. *Hopkins*, *Ambler*, 273—*Jacobs* v. *Amyatt*, 4 *Bro.* 542—*Wilson* v. *Vansittart*, *Amb.* 562—2 *Roper on Legacies*, 402.)

On this point also, I claim the benefit of the opinion of a majority of the Court, in *Whitehurst* v. *Pritchard*, (1 *Mur.* 385.)

Where a bequest is made to "children," grandchildren do not take, unless there be *no child*, or the context shews that the word was designed to have a meaning more extensive than properly belongs to it. (See *Loveday* v. *Hopkins*, *Amb. as above*—*Crooke* v. *Brooking*, 2 *Ver.* 106 —*Reeves* v. *Brymer*, 4 *Ves. jr.* 692–1 *Rop. on Leg.* 106, 107.)

If the word "heirs" be synonomous with next of kin, it does not, *as such*, take in the grandchildren.

In *every sense*, in popular and legal parlance, a child is nearer of kin than a grandchild. (2 *Bl. Com.* 203, 504, 5.)

Grandchildren take as *next of kin*, by statute of distribution, only when there are no children. They take, not as *next of kin*, but by virtue of a capacity bestowed on them, as *representing* next of kin, whenever there is a child.—(*Toller.*)

This view of the case is consistent with, and perhaps demanded by, a numerous class of adjudications which decide, that when a gift is made by words of *definite description*, such as "children of A. B." the donees take not as representatives, but as designated individuals, as though they had been severally named. (*Blackler* v. *Webb*, 2 *P. Wms.* 383—*Butler* v. *Stratton*, 3 *Bro.* 367—*Wild* v. *Bradbury*, 2 *Ver.* 705—*Davenport* v. *Hanbury*, 3 *Ves. jr.* 259.)

2. These words "heirs lawfully begotten of my daughter," may have been used as indicating "persons lawfully representing my daughter." If so, the grandsons take with *her* daughter—but these take as such representatives, and take *one* share only.

The subject matter is *personalty*—therefore, *heirs*, strictly speaking, cannot be meant.

There is a strong analogy between lineal descendants succeeding to the personalty, and lineal descendants inheriting the land of a deceased ancestor.

It is our duty to take the word as nearly to its proper sense as it will admit.

Then it means that class of persons who represent her in succession to personalty—who would succeed to her undisposed money and chattles.

This is the opinion of a great Judge. (*Holloway* v. *Holloway*, 5 *Ves. jr.* 402.) So have similar words been understood. (*Bridge* v. *Abbott*, 3 *Bro.* 224. *Long* v. *Blackall*, 3 *Ves. jr.* 486.)

JUNE 1827.

Ricks et al. v. Williams. Williams v. Ricks et al.

If this be the meaning of these words, then these "legal representatives" take together an equal share with the persons named.

The statute of distributions directs an equal division among the children of an intestate, and the legal representatives of a deceased child. (*Toller*, & *act* 1766, *ch.* 79.)

The *equality* of division is as precisely ordered in *this statute*, as in the will under consideration.

Had Taylor made no will, the law would have ordered a division nearly in the words, which he has *here* used.

Why should the same words used by *him*, receive a meaning different from that appropriated to them when found in a statute, and deliberately penned.

Is there less liberality shewn in expounding the words of an illiterate man, when *inops concilii*, than of an Assembly representing the wisdom of the community.

If "heirs, &c." be equivalent to "lawful representatives," then they take as *representatives* what would have been given to her whom they represent.

There is no more incongruity in these persons taking under the will, as representatives of one to whom nothing had passed, than in children taking, under a statute, (a general will for intestates,) under one to whom nothing had accrued.

But it is objected, that this construction is forbidden by another class of adjudications, on the words "relations," "kindred," &c.

This class of cases has settled, that such vague words shall be *limited* in their *extent* by the statue, but the division shall be wholly independent of the statute. (*Thomas* v. *Hale, Ca. Tem. Talbot* 251—*Greene* v. *Howard*, 1 *Bro.* 31.)

These decisions are wrong in principle; the Court in order to *expound* the will, imply a reference to the sta-

tute of distributions. The construction ought therefore, to have been the same as if this *reference* was expressly contained in the will. If the reference had been expressed "according to the statute of distributions," the statute would have explained the equal division, as well as ascertained those between whom it is to be made.

This is admitted by one of the strongest champions, for this doctrine and most zealous extender of its application, *Mr. Justice Buller*, (*Phillips* v. *Garth*, 3 *Bro.* 68.)

But the present question is not affected by those decisions. The words are either definite in themselves, and require no reference to the statute to limit their generality, or they are of the same import with those used in the statute, and in connection with a like context, must receive the same interpretation. *Justice Buller* indeed, thought otherwise, (*Phillips* v. *Garth.*) But he was opposed by an authority *at least* of equal respectability, *Ld. Thurlow*, and acknowledged that he was violating an authority greater than either of them, plain good sense.

This view is strengthened by the principle to be extracted from *Wythe* v. *Thurlston*, (1 *Ves. sen.* 196) commented on in *Davenport* v. *Hanbury*, (3 *Ves. jun.* 259, 260.) Where there is enough on the will to shew that "children," &c. are used as representatives or substitutes, in common parlance "heirs," of their parent, they take in that capacity, and the share which would have been allotted to that parent.

Badger, in support of the Decree.—Two questions are made upon the residuary clause of in the will. 1. Do the grandchildren of *Priscilla*, take with her children under the description "*lawfully begotten heirs.*" 2. If they take, in what proportions.

COURT. (After a moment's consultation.) It is unnecessary for you to discuss the first question.

Badger.—It is clear they are entitled *per capita*, by force of the words "equally to be divided," which are

Dec. 1826.

Ricks et al. v. Williams. Williams v. Ricks et al.

equivalent to "share and share alike," and import a tenancy in common.

This has been settled by a series of adjudications, upon expressions exactly analagous to those in this will.

Where the bequest was "equally to son *J.* son *P's* children, daughter *T.* and daughter *W's* children," it was held that all were entitled equally *per capita*, as if severally named. (*Blackler* v. *Webb*, 2 *P. Wms.* 383.)

So where the words were "equally between *R. C. S.*, *J. S.* and the children of *M. P.*" "equally between descendants of *T. F.*" and among the descendants of *T. F.* there were children and grandchildren—held all were entitled *per capita*. (*Butler* v. *Stratton*, 3 *Brown C. C.* 366.)

So "to be divided among next of kin share and share alike." (*Philips* v *Garth.*)

In the last case, there was no difference between *Mr. J. Buller* and *Ld. Thurlow*, as to the proportions in which the grandchildren should take, as seems to be supposed by the Counsel on the other side. *Buller* thought the grandchildren entitled—the Chancellor inclined that they were not entitled at all; but if entitled, both agreed that upon authority, they should take *per capita*, though both doubted the original propriety of the decisions.

This is evident from what fell from *Ld. Thurlow*, in *Rayner* v. *Mowbray*, (3 *Brown*, 335.)

It is in vain, that the Counsel allege these decisions to be wrong in principle. Even if wrong at first, they have fixed the law, and cannot, without great mischief, be now overturned. *Ld. Thurlow*, in the last case, said in reference to these very decisions, "where once a rule has been laid down, it is best to abide by it. We cannot always be speculating what would have been the best decision in the first instance."

And this Court, at the last Term, felt the weight of authority to be so great, that they reluctantly decreed a partition *per capita*, under a clause in a will, strongly indicating that an equality of division between the stocks

or families, and not the persons, was designed by the testator. (*Stowe* v. *Ward*, 3 *Hawks* 604.)

Taking the words "lawfully begotten heirs" to be equivalent to "next of kin," an argument has been drawn from the statute of distributions, here and in England, to shew that the grandchildren can take only in place of their parent and *per stirpes*. It is supposed that "next of kin" is used in the statute to signify those nearest of blood, and in equal proximity to the intestate. An examination of the statute will shew this supposition to be unfounded. Our statute (a transcript of the English, with only one or two barely literal variations) recognizes the right of representation as existing by law, and of course referring to the descent of real estate, and does not use the words in question, until it comes to provide for a distribution where there are no descendants of the intestate. The words are, "and in case there should be no children, &c." "then one moiety, &c." "the residue of the said estate to be distributed *equally* to every of the next of kin of the intestate, *who are in equal degree*, and to those who legally represent them."

By adding to the words *next of kin*, the qualifying expression *who are in equal degree*, it is clear the former words did not of themselves import what is expressed by the latter. The Legislature must have supposed, that in their sense of the words, there might be next of kin, some nearer in blood than others, yet all next of kin. For otherwise, the expression added is without use or meaning, it is mere tautology.

But if "next of kin" means those who are themselves nearest of blood, and also those who represent persons deceased, who were nearest of blood, there is a propriety and even necessity, for every word, in order to convey what the Legislature meant.

Dissect the clause—"equally to every of the next of kin." By these words, brothers and sisters, and the children of deceased brothers and sisters, would all have

Dec. 1826.

Ricks et al. v. Williams. Williams v. Ricks et al.

taken *equally per capita*. But this was not intended.—Hence the words "who are in equal degree" were added. Had the clause stopped here, brothers and sisters surviving would have taken, as being *the nearest in equal degree*, to the exclusion of the children of a deceased brother or sister. But this was not intended, and hence the words "and to those who legally represent them," are superadded; by which the *equality* of distribution is confined to those who are in equal degree; and the representatives of one who was in equal degree, take his equal share among them.

Consequently, where in a will the words "next of kin," or words of equivalent meaning are used, they point out *all* who would take under the statute, and if the words "equally" or "share and share alike" be added, they all take *per capita*, as they would have done under the statute, had the expression been "equally to every of the next of kin" without the explanatory words. The words designate the persons by reference to the statute, and the will fixes the proportion, which is equal to each by force of the words "equally to be divided."

The Court held this case under advisement until this term, when their opinion was delivered by

HENDERSON, Judge:

I think in principle, this question was decided at the last term, in the case of *Whitfield's* will, (4 *Hawks* 393,) for if "heirs," when applied to personal property, mean those who are called by law to succeed to the dead man—they bring with them their representative and collective character—and however the property may be divided among themselves, as individuals composing a body, yet as to others, they are an unit, and make but one person, the representative of their ancestor or *propositus;* and so, whether they take by descent or purchase, it is *designatio personæ*, not *personarum*. I refer to the reasons and authorities in the case of *Stowe* v. *Ward*, (*ante* 67)

decided at this time, to support this position throughout; in fact, the cases are, to my mind, precisely alike; the only difference is, in that case it is real property; in this, it is personal: in either, however, the word "heir" has the same meaning as to its representative and collective character. I am not aware of any authorities, except those cited, and attempted to be disposed of in the case of *Whitfield's* will. That this construction meets the Testator's wishes in this will, I have not a doubt. It is plain from the words, he intended a division by stocks or families—and he could not have used a more appropriate word than "*heirs of my daughter Priscilla*," to call them in as a stock or share. I must again express my regret for the decision in the case of *Whitehurst's* heirs—it cannot be supported.

The decree in this case must be reversed, and an account taken of the money paid under it—and the property mentioned in the residuary clause of *Rowland Williams'* will, must be divided into five equal parts—one of which is decreed to each of the children of the testator, to wit, *Pilgrim*, *Diana*, *Charity* and *Elizabeth*, and one-half of the remaining fifth to *Micajah Ricks*, and the other half of said fifth, equally between *Thomas Ricks* and *Tedkle Ricks*, and for this purpose, the master will take an account.

There being in this case both bill of review, and a petition to rehear—the bill of review must be dismissed, but without costs—The loose practice in our Courts of Equity rendering it somewhat difficult to ascertain the propriety of using the one or the other—and these proceedings were commenced before the decision in the case of *Jones* and *Zollicoffer*, where the matter was very fully discussed and settled.

DECREE SET ASIDE.

Dec. 1826.

The Attorney-General upon the relation of sundry citizens of Raleigh, v. Theophilus Hunter. } From Wake.

Injunctions are not awarded by Courts of Equity for the infringement of doubtful rights, until they have been established at law. But when the right is clear and the injury irreparable, an injunction will be awarded, although the right has not been established at law.

Where a bill charged that the Defendant's mill-dam injured the health of the relators, an injunction was perpetuated, notwithstanding the Defendant had been indicted for the same nuisance, on which there had been a mistrial, and although an indictment was still pending.

The bill charged that the Defendant had erected a mill-dam in the vicinity of the City of Raleigh, that the exhalations from the pond, had rendered the inhabitants unhealthy, and prayed a perpetual injunction.

The Defendant by his answer, denied that his mill-pond had any pernicious influence upon the health of the town, and averred that he had been indicted in Wake County Court for a nuisance in erecting the dam, and that the Jury, upon an attempt to try the indictment, had disagreed, and had refused to find a verdict for the State. That subsequently a *nolle prosequi* had been entered by the prosecuting officer. That the Defendant had again been indicted in the Superior Court, that a trial had been delayed by the State, the Attorney-General entering a *nolle prosequi* and ordering new process, and that this last indictment was still pending.

Much testimony was taken and read at the hearing, which it is not necessary to recapitulate, as the Court thought that the allegations of the bill were fully sustained.

The case was argued at June Term 1826, by *Gaston*, for the Plaintiffs, and *Badger*, for the Defendant; no note of which argument, is in the hands of the present Reporters. At that Term, the final decree was settled,

Dec. 1826.

Attor. Gen'l. v. Hunter.

but from some oversight, it was not entered, or the cause reported.

The opinion of the Court was delivered by HENDERSON, Judge:

We are satisfied beyond a reasonable doubt, that the flowing back of the water, as contemplated by the Defendant, according to his own admissions, will create a public nuisance, and that of the worst kind, being one destructive to the health and comfort of the citizens of Raleigh. And we are called on to send the question of nuisance or no nuisance to a Court of Law; for what—to inform our consciences? they are already informed. And were a Jury to find that it was not a nuisance, in a case of this kind, we should feel ourselves bound to disregard their verdict; for a Jury would require the most satisfactory evidence of the fact, at least they would require a preponderance of evidence, to convict; with us, under all the circumstances of the case, a *probability* is sufficient. In the first place, the injury is irreparable, the place, the seat of government, where its officers are compelled to reside. These things make a difference between this case and that of a common nuisance. It is true it is a question of the most delicate kind, an interference with private rights, from which all departments of government should abstain, except in cases of necessity. It is however a sound political maxim, and one sanctioned by the Courts of Justice of this country, that individual interest must yield to that of the many; and this is something like the interest of the many, for every individual is in some way or other, interested in the welfare of the capital. We refer to the decision of *Bell* and *Blount*, (4 *Hawks*, 384) as an authority to shew the jurisdiction of the Court. Where the right infringed is of a doubtful character, as the right of view over another's ground, there a Court of Equity will order the right to be established at law, before it will grant an in-

Dec. 1826.

Kirk et al. v. Turner.

junction, in the mean time, staying the owner of the land from closing up the view; but here the rights infringed upon, are of a character not in the least doubtful, the health and comfort of the relators, and others for whom they act.

INJUNCTION PERPETUATED.

John L. F. Kirk and others, infants, by their next friend John L. Kirk, v. Josiah Turner, administrator *de bonis non* of Thomas Whithead. } From Orange.

A delivery of a deed is a parting with the possession of it by the grantor in such a manner, as to deprive him of the right to recall it.

Where a deed was handed to the subscribing witness, as the agent of the grantor, for the purpose of being proved, and was by the agent delivered to the grantor without being proved, held, that this was not a delivery.

It seems where a claim is asserted on the part of infants, who have an appearance of right, each party must pay their own costs.

ORIGINAL BILL, the allegations of which were that *Sarah Kirk*, the grandmother of the Plaintiffs, being about to contract a marriage with *Thomas Whithead*, and being desirous of settling her property upon the Plaintiffs, applied to one *Snipes* to draw deeds of gift to them for certain slaves. That the deeds were drawn accordingly, reserving a life estate in the slaves to *Sarah*; that *Sarah* executed the deeds, and that they were attested by *Snipes*, and left with him for safe keeping. That after the marriage was solemnized, the deeds came into the possession of *Whithead*, and were by him destroyed. The bill also alleged, that *Whithead* had notice of all these facts, and had in his life-time, disclaimed all right to the negroes, except a right to their services during his life, and prayed that the deeds might be set up in this Court, and the title of the Plaintiffs protected in the same manner as if they had been regularly

The answer denied all personal knowledge of the transaction, and put the Plaintiffs to strict proof of their case.

Snipes, on his examination, proved that the deeds were drawn by him, signed and attested as alleged in the bill. That after he witnessed them, he was asked by *Mrs. Kirk* if he would be at the next Court, as she wished the deeds recorded, that he replied it was uncertain, and that she had better go and acknowledge them, when the deeds were handed to *Mrs. Kirk*, and had not since been seen by the witness.

Another witness, who was seriously impeached, swore that *Whithead* and his wife, both informed him, that the latter had, before the marriage, given her negroes to the children of *John L. Kirk*, the present Plaintiffs, reserving a life estate to them both.

A third witness testified that he had applied to *Whithead* to buy a negro boy, formerly *Mrs. Kirk's*, and was informed, that he could not make a good title to him.

Murphey, *Badger*, and *Wm. H. Haywood*, for the Plaintiffs, cited *Bank of Newbern* v. *Pugh*, (1 *Hawks*, 198—*Shep. Touch.* 58.)

Nash, on the other side, was stopped by the Court.

The opinion of the Court was delivered by

HENDERSON, Judge:

A delivery of a deed is, in fact, its tradition from the maker to the person to whom it is made, or to some person for his use, and if the person receiving it for another, is authorised to do so, it is not only immediately the maker's deed, but it cannot be rejected by the grantee. If he has not authorised the person to receive it, yet it is the maker's deed, until he, for whose benefit it is made, rejects it; it does not wait for the approbation of this person, before it becomes a deed; for his accept-

Dec. 1828.

Kirk et al. v. Turner.

ance is presumed, until the contrary is shewn. It being for his interest, the presumption is, not that he *will* accept, but that he *does*. Therefore, if there was any evidence, that the deed in question was left with *Snipes*, for the benefit of *Mrs. Kirk's* grandchildren, and was not subject to her control, the delivery to him for the use of the children, would have been complete, and the deed efficacious, notwithstanding his re-delivery of it to her, for the purpose of registration. But the transaction, I think, by no means bears this aspect. *Mr. Snipes* was called on to write the deed as a settlement, preparatory to the marriage which *Mrs. Kirk* then contemplated: in this, he acted as much in the character of her agent, as that of the grandchildren. His having the paper in his hands, might well arise from his relation to her; there were no words shewing that *Mrs. Kirk* parted with the possession or control of the paper. The request that he would attend Court and prove the deed, neither shows, that the act, on her part, was intended to deprive her of the control of it, or that the deed was then complete, or that she lost her *locus pœnitentiæ*, which it is presumed she intended to retain, at least, until there was something like a certainty of her marriage. In fact, her conduct shews, that it was her intention then, in case of the marriage, to make such a settlement, and no more; at least it does not furnish sufficient evidence, that the transaction to which *Mr. Snipes* testifies, was such an one as to divest her of the property, and vest it in the Plaintiffs, which it must be affirmed to be, before we can set up the deed, and deprive her husband of the property. If this transaction did not divest her of the slaves, it may be asked what did, if there was a conversation in which she stated that she had given the property to her children, if it should be referred to this inchoate intention, it would not pass the property, for we see that this intention had not that effect. It would be unfair to refer it to a parol gift complete, when there is

this transaction to which we may refer her words, and with the more certainty, as her conduct in this transaction refutes all idea of a parol gift, for it appears, that if she designed to give, she preferred a written transfer, and had the means in her power of making one.

The declarations of the husband may also be referred to the same attempt; and her conduct afterwards, in not having the deed registered, accompanied by his declarations, proven by a person shewn to be of undoubted credit, is a full exposition of her views throughout, viz. that she intended to act in this particular, in case she was to marry, as she pleased; and if disposed to make the settlement, she might use the deed for that purpose, prepared by one in whose skill and judgment she had confidence. That she did not intend to part with the deed, is supported by the circumstance, that on its face, it is not made to depend on the event of her marriage, but is absolute, which would, from the attempt proved by *Snipes*, if final, deprive her of her property, marriage or no marriage, which I think it is evident she did not design.

The probability is, that she intended then to give validity to the deed by some after act, if she married; if not, it was to have no effect. It seems she changed her mind. As this is a claim asserted on behalf of infants who had an appearance of a right, each party must pay his own costs.

BILL DISMISSED.

Dec. 1826.

Thomas Alston
v.
James Maxwell and Willie Perry, ex'rs of Stephen Outerbridge. } From Franklin.

Morality and good faith, require that the vendor should disclose to the vendee every circumstance which may induce the latter to change his mind as to the contract.

Where a trustee sold at vendue *a fee simple* in the trust land, and before the execution of the contract, the trustee and the *cestui que trust*, discovered that the trust deed created only a life estate, held that the concealment of this discovery was fraudulent, and vacated the contract, although the trust deed was publicly read, and the trustee only undertook to convey the title he had, and although the *cestui que trust* refused to guarantee the title of his trustee.

BILL FOR AN INJUNCTION, the material allegations of which were, that one *Marmaduke Jeffreys* had conveyed a tract of land to *Richard H. Fenner*, in trust to secure a debt due *Outerbridge* by *Jeffreys*. That the deed was defective, first because it was a deed of bargain and sale, and no valuable consideration was recited in it, as having passed from *Fenner* to *Jeffreys*. Secondly, because there were no words of inheritance in it, and at the most, it conveyed only a life estate to *Fenner*. That both *Outerbridge* and *Fenner*, his trustee, had express notice of these defects, having been informed of them by two gentlemen of the profession; and that they fraudulently sold the land at vendue, without disclosing the defect in the title of *Fenner*, when the Plaintiff became the purchaser, and gave his bond for the purchase money. It was admitted in the bill that by the terms of sale, the trustee was only to convey the title which he held under the deed from *Jeffreys*, and that *Outerbridge* had refused to warrant the title of his trustee; but it was insisted that this was intended to apply only to the original title of *Jeffreys*, or to his estate in the land, at the date of his deed to *Fenner*, and not to the quantity of estate conveyed by *Jeffreys* to *Fenner*. In proof of which, it was averred that the land

was sold as a fee simple, and that the deed from *Fenner* to the Plaintiff, was properly drawn to convey a fee, if *Fenner* had one.

It was also admitted, that the deed from *Jeffreys* to the trustee, was publicly read when the land was sold, but the Plaintiff insisted that from his ignorance of the forms prescribed for conveyances, he was not aware of the defect at that time, nor did he become so until after the contract was executed. The bill prayed an injunction upon a judgment obtained on the Plaintiff's bond, for the purchase money and general relief.

The Defendant in his answer, denied all fraud, and insisted that the Plaintiff had bought with a full knowledge of the limitations in the deed to *Fenner*.

He also averred that he was informed by his Counsel, who drew the deed from *Jeffreys*, that although it was informal, yet that it conveyed a fee simple in the land; this was fully supported by the testimony of his Counsel, *Mr. Person*.

A witness, *Mr. Johnson*, proved that he had informed both *Outerbridge* and *Fenner* after the sale, but before the execution of the deed from *Fenner* to the Plaintiff, and before the latter gave his bond for the purchase money, of the defects in the deed to the trustee.

The case was argued at June Term 1826, the *Attorney-General*, *Seawell*, and *Badger*, appearing for the Plaintiff; and *Gaston*, for the Defendant; no note of that argument is in the possession of the Reporters.

HENDERSON, Judge.—I accord with my brethren in saying that this contract should be set aside on the ground of fraud; it appearing from unquestionable evidence, that both *Outerbridge* and his trustee *Fenner*, knew before the title passed, and before the Plaintiff gave his bond, that the trustee could rightfully make but an estate for his life, such being only the extent of his own estate; notwithstanding the repeated declarations made both by

Dec. 1826.

Alston v. Outerbridge.

Outerbridge and his trustee at the sale, that only such title as the latter had, was offered for sale, and the reading the deed aloud, to shew what that title was, that the bidders might judge for themselves. It is evident that this was understood to relate to the title, and not the quantity of estate in the lands, and that a fee simple was offered for sale. Morality and good faith should have induced the Defendants *Outerbridge* and *Fenner*, to disclose to *Alston*, when about to take his bond, the discovery which had been made, for they certainly knew that such information would have produced a total change in his intentions; and that *Outerbridge* was about to get from *Alston*, the full value of an estate in fee simple, which he knew that *Alston* thought he was acquiring, when an estate only for *Fenner's* life was conveyed to him. Upon strict principles of law, even if *Outerbridge* and *Fenner* were really ignorant of the quantity of estate in *Fenner*, yet as they professed to sell and did contract to sell an estate in fee, I doubt whether they have in reality, complied with their contract, or conveyed to *Alston*, that estate which they had contracted to sell.—*Fenner* had but an estate for life, and could by estoppel only convey a larger estate. By a reference in his deed to *Alston*, *Jeffreys'* deed to him became part of the deed to *Alston*. Thus the matter was left at large, there being estoppel against estoppel.

But relief being clear upon the ground of fraud, I give no opinion upon this latter point.

Hall Judge.—It may be taken for granted, in this case, that it was the understanding of the parties, that a title in fee simple in the lands, was conveyed from *Jeffreys* to *Fenner*, the trustee. This was the understanding of *Person*, who drew the deed of trust; but it does not appear that the defendants were undeceived in regard to that, before the sale of the land to Complainant.

Person states, that after the execution of the deed of trust, he drew another, and recommended to *Outerbridge*, to have the last executed, as it was drawn more fully than the first, though he believed the first was sufficient for all the purposes for which it was given.

However, it seems, that after the sale, but before *Alston* had executed his bond to *Outerbridge*, and before *Fenner* had executed the deed to *Alston*, *Johnson*, the attorney who drew the deed, informed both *Fenner* and *Outerbridge*, that nothing except a life estate was conveyed by the deed of trust from *Jeffreys* to *Fenner*.

It is true, *Outerbridge* refused to warrant the title of the land to the Complainant, but that was a fee simple title in *Jeffreys*, for such it was apprehended was conveyed from *Jeffreys* to *Fenner*. The ground of refusal was, that *Jeffreys'* title in fee simple might not be good, not that he had conveyed a title less than a fee, or any title less than he had.

When *Fenner* and *Outerbridge* were informed by *Johnson* that only a life estate was conveyed to the former, they were apprised of an important fact relative to the title, to which *Alston* was a stanger—this fact they concealed, by doing so, they practised upon *Alston* that which the law pronounces to be a fraud, and that at a time when they were not in a worse situation than they stood in before the sale, or indeed, as far as it appears, at any time after the execution of the deed of trust.

I am therefore of opinion, that the injunction should be made perpetual.

TAYLOR, Chief-Justice, concurred.

INJUNCTION PERPETUATED.

Dec. 1836.

Jonathan Cheshire
v.
George Booe, Administrator of Thomas Garrawood, and the distributees of said Garrawood. } From Rowan.

It seems that fraud practised by *cestui que trust*, will avoid a sale honestly made by the trustee.

ORIGINAL BILL, the allegations of which were that the Plaintiff had purchased of the Defendant *Booe*, a negro girl belonging to the estate of his intestate. That the negro, at the time of the sale, was laboring under a mortal malady, of which she soon after died. That the Plaintiff was not aware of her ill health at the time of the sale, or at the time he paid the purchase money, charging that if the Administrator had no notice of the unsoundness of the negro, the fact was well known to the widow of the intestate, and to his children, who had concealed the defect, and used many means to induce the Plaintiff to purchase. The bill prayed that the purchase money might be refunded to the Plaintiff, and he be indemnified for the charges he had been at in taking proper care of the negro.

The Administrator, by his answer, denied all knowledge of the negro's unsoundness, and stated, that when applied to by the Plaintiff, at the sale, on this subject, he referred him to one *Glasscock*, who was present, and had hired the girl the year before.

The answer of the widow of the intestate, which was referred to by that of the children, denied any fraudulent concealmeant, and averred, that the girl, although she had been unwell the year before the sale, was, to the best of her judgment, healthy at the time of the sale.

The proofs read at the hearing were very voluminous, but it is not thought necessary to repeat them.

No Counsel appeared for the Plaintiff in this Court—*Murphey* and *Nash* for the Defendants.

The opinion of the Court was delivered by

HALL, Judge:

Taking it for granted, that fraud in the *cestui que trust*, will avoid a sale honestly made by the trustee, and therefore assuming it as a duty to look into the testimony in this case, I have examined the depositions, and am of opinion, that it is altogether unnecessary to give the evidence in detail—much of it is irrevalent, some little of it seems to throw a suspicion upon *Mrs. Garrawood*, but by no means sufficient to establish such a fraud, as would entitle the Plaintiff to relief. It seems to be clearly established, that the negro girl in question was a healthy one, until she was hired out to *Glasscock*—during that year, it seems, she was somewhat sickly, some part of the time she was with *Mrs. Garrawood*, particularly a few days before she was sold; but it does not appear that *Mrs. Garrawood* had knowledge of her complaint and concealed it. Indeed, it does not appear what was the nature of the complaint she died of, or what her complaint was when she was sold. I think the bill should be dismissed with costs, except as to *Mrs. Garrawood*, who must pay her own.

BILL DISMISSED.

Robert H. Wynne and Susan his wife
v.
Peyton R. Tunstall.
} From Halifax.

In a partition under the act of 1787, a charge of money upon the more valuable dividends for equality of partition, is a *legal* charge upon the *land*, and follows it into the hands of a purchaser for valuable consideration without notice.

Money thus charged is realty, as much as the land for which it is the substitute; and where it was allotted to the share of a feme covert, and the husband had taken a bond and given a receipt for it, held that the husband and wife could recover the amount for her use.

THE BILL charged, that the Plaintiff *Susan*, was entitled to one-eighth of a tract of land in Northampton county, as tenant in common in fee simple, with seven

Dec. 1826

Wynne et ux. v. Tunstall.

other persons. That a petition for a partition thereof, was filed in Northampton County Court, and after proper proceedings had, a partition was returned, whereby lot number five was assigned to the Plaintiffs in severalty, valued at 5,500 dollars, that the value of each share was $6,547 62½; that for equality of partition the sum of $1047 62½, was added to the share drawn by the Plaintiffs, and was charged upon lot number seven, in the partition, which was drawn by one *Marmaduke N. Jeffreys*. That *Jeffreys* had never paid the said sum of $1047 62½, but was utterly insolvent, and had sold his share to the Defendant *Peyton R. Tunstall*, who had, at the time of his purchase, notice of the charge thereon, in favor of the Plaintiffs. The bill prayed general relief, and also specialty that the land drawn by *Jeffreys*, and conveyed by him to the Defendant, might be sold by order of the Court, for the purpose of paying the sum of money due to the Plaintiffs for equality of partition.

The Defendant, by his answer, admitted the partition and charge as set forth in the bill, and that he had notice of the charge upon the lot drawn by *Jeffreys*, at the time of the partition. But he stated that he purchased that lot of *Jeffreys*, on the 22d of September 1817, that the partition was made in December 1814, and he supposed that *Jeffreys* was obliged, at the time of the partition, either to pay or secure the sum charged upon it, and that it had accordingly been paid or secured. He therefore denied, that he had any notice of the claim of the Plaintiffs at the time of his purchase, and insisted that he was a purchaser for a valuable consideration. He also averred, that the Plaintiff *Robert* well knew of the negotiation for his purchase from *Jeffreys*, from its commencement to its close, and fraudulently or negligently concealed his claim upon the land. That *Jeffreys* continued solvent, until December 1819, and that the claim of the Plaintiffs as now urged, was not asserted until June 1830, and that had he received earlier no-

tice, that his land was held subject to the Plaintiff's claim he might have paid it and procured an indemnity from *Jeffreys*. The Defendant also charged that the Plaintiff *Robert* had in November 1819, settled with *Jeffreys* for this claim, had taken the negotiable security of *Jeffreys* for the amount thereof, and given a receipt therefor, and thereby had elected to consider it as a personal demand upon *Jeffreys*. The Defendant therefore insisted, that the Plaintiffs were barred of all equity, either by the fraudulent concealment of their claim; by their latches in not asserting it, whereby the Defendant was deprived of all opportunity of procuring a counter security, or by their election, to consider the amount as a personal demand against *Jeffreys*.

The Plaintiffs by an amendment, admitted that the Plaintiff *Robert*, had taken the bond of *Jeffreys*, as set forth in the answer, but averred that he had done so only in the hope of receiving satisfaction from *Jeffreys* in which he had been dissappointed, and denied that he had recieved payment of said bond, either from *Jeffreys* or by negotiating it.

There was evidence taken on both sides, but it did not materially vary the facts as presented by the bill and answer, and a recapitulation of it is not deemed necessary to the elucidation of the case.

At the hearing before Judge DONNELL, on the fall circuit of 1825, his honor decided that the Defendant had notice of the charge, and decreed that he should pay the sum of $1047 62½, charged upon lot number seven, with interest thereon, into the Master's Office, for the use of the Plaintiff *Susan*, in such manner as the Court might direct, and that each party should pay their own costs. From which decree, the Defendant appealed.*

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* In the reports of Equity Cases, whenever the manner in which they are brought up is not mentioned, the reader will consider that they were removed under the act of 1818, sec. 5th.

Dec. 1826.

Wynne et ux. v. Tunstall.

The case was argued at June Term 1826, by *Gaston* and *Hogg*, for the Appellant, and by *Badger*, for the Plaintiffs. The Reporters have only an imperfect note of that argument.

For the Appellant it was insisted,

1. That the sum charged for equality of partition, if in any view a lien, was a legal one, and could be enforced by an execution founded upon the final judgment in the petition for partition; (*Revised Code, ch.* 274, 558.) and therefore the Plaintiffs had mistaken their forum.

2. That supposing an equitable lien to exist, the Defendant was not affected with notice of it; he did not know that a lien existed; he only knew that there was an inequality in value; and notice to affect the conscience of a purchaser, must be notice of a subsisting demand.—(1 *Brown C. R.* 301—2 *Do.* 380—4 *Wheaton* 294—15 *Ves. jr.* 329—1 *John. Chan. Rep.* 308.)

3. That the equity of the wife was no higher than that of the husband, and whatever affected his equity, equally affected hers; for the Act does not provide that the sum charged for equality of partition, shall retain its character for reality—as it does in sales for the purpose of division. And whenever realty is turned into personalty, by a judicial sale, there being no provision to the contrary, it assumes the character of personalty. (*Exparte Bromfield*, 1 *Vesey jr.* 443—*Mondey* v. *Mondey*, 1 *Vesey & Beame*, 223—*Mills* v. *Dennis*, 3 *Johns. Cha. Rep.* 367—*Ambler* 417—*Do.* 706.

4. The doctrine of equitable liens, as now existing in England, did not obtain there at the period of the Revolution. (*Ambler* 724—*Brown C.* 420.) It is founded upon the fact, that lands, in England, cannot be sold for debt. The policy of our law is quite different—our laws respecting registration render it inapplicable. In England, the rule has produced great confusion, and many of the States in this country have refused to adopt it.—

(15 *Vesey jr.* 324—4 *Wheaton* 364—1 *Dess. Chan. Rep.* 502—7 *Wheaton*, 52—1 *John. Chan. Rep.* 308.)

5. This Court is not precluded from looking into the evidence taken in the cause, and revising the decision thereon. An appeal in chancery carries up the whole case as to the facts and the equity arising from them.

6. That the bond of *Jeffreys* taken by *Wynne*, and the receipt given for the sum charged for equality of partition, discharged the lien, as thereby the nature of the debt was entirely altered. (2 *Vesey jr.* 543.)

It was contended on the other side,

1. That this Court could only decide upon matters of law, matter of fact, as well as matter of discretion, are not subject to its revision. This Court was therefore bound by the decision of the Court below, upon the fact of notice.

2. In Equity, the vendor has a lien for the purchase money, whether he has taken a security for it or not.—It exists from the presumption of Natural Equity, that no one will sell his land, and rely upon a *promise* for payment. A receipt being given for the purchase money, can make no difference, if the vendor has not actually received it.

3. The only question is, had the Defendant notice of the charge. He certainly had constructive notice, for the partition is one of his title papers.

4. That the Acts of Assembly made the sum given for equality of partition, a charge upon the more valuable dividends. It is a specific lien upon the land, in whosoever hands it goes, similar to the case of a rent given for equality of partition. (*Littleton, Sections* 252, 253—*Gilbert Tenures*, 104, 105, *Coke L.* 196, *b.*)

5. This is a specific lien, and the land is liable, although the Defendant had not notice; for a specific lien is a charge upon the *land*, not upon the *estate* in the land, and follows it forever. The rule as to purchasers without notice, applies only to trust—not legal rights.

Dec. 1826.

Wynne et ux. v. Tunstall.

HALL Judge delivered the opinion of a majority of the Court :—

The act of 1787, (ch. 274,) authorises the County Court to make division of the estates of intestates, and the Commissioners appointed by the Court for that purpose, are empowered to *charge* the more valuable dividend or dividends, with such sum or sums as they shall judge necessary, to be paid to the dividend or dividends of inferior value, in order to make an equal division.

I think the lands on which such sums are charged, are not only securities for the monies so charged, but are themselves the debtors. This appears to be just and fit, in a case where partition is made of lands between persons possessed of no other property. The law cannot contemplate the injustice of taking property from one person and giving it to another, without an equivalent, or a sufficient security for it.

The Act above spoken of directs "the Commissioners to make a return of their proceedings and appropriations, &c. to the Court by which they were appointed, which return and appropriation shall be certified to the Clerk, and enrolled in his office, and registered in the office of the County, where such lands, &c. respectively lie; and such return and appropriations, shall be binding among the claimants, their heirs," &c.

This act also directs the money so charged, to be paid in twelve months after such return made.

A subsequent act, passed in the year 1801, (ch. 588.) gives further time to minors; but the validity of the appropriations made by the Commissioners, does not depend upon the payment or non-payment of the monies charged upon the larger dividends.

The Defendant, in his answer admits, that at the time he made the purchase, he knew that the charge on the land once existed, but he believed that it had been paid or settled. Whether he had express knowledge of that fact, or not, I think is immaterial, for the debt was a legal

charge upon the land—and the fact of its existence was so blended and interwoven with the title to the land, that he could not enquire into, and examine the title, without perceiving it, for *Jeffreys* claimed directly under the partition and appropriation made by the Commissioners.

It is argued also for the Defendant, that this debt was discharged by the receipt given by *Wynne*, in the year 1819, in which it is stated, in substance, that the account is settled, and a bond taken for it.

This was no discharge of the debt, which is a legal and express charge upon the land; but what is conclusive, is that the receipt was subsequent to the purchase by the Defendant—besides, he was not a party to it.

In point of fact, I think it a hard case upon the Defendant. *Wynne* has certainly been guilty of neglect—but *Mrs. Wynne* is the meritorious claimant, and the debt, when recovered, ought to be secured for her benefit.

HENDERSON, Judge, dissented, but filed no opinion.

The following is the substance of the Decree in this cause:

Declare that the sum of $1047 62½, allotted to the Complainant *Susan* was an express charge upon the land allotted to *Marmaduke N. Jeffreys*, to which the said *Susan* was entitled, in the same manner, as to the real estate, in lien of which the same was charged, and that her right thereto was not affected by the receipt given by the Plaintiff *Robert*. Declare, further, that the Defendant purchased with notice of the right of *Susan*, and that the lands passed, subject to the charge for the said sum, and continue liable therefor. Declare that the Defendant pay into the office of the master, the said sum, with interest from the 1st April, 1816, and the costs of this suit, and in case of default, that the master sell, &c. Declare, also, that the Defendant, as well as *William Dogget* and *William Wooten*, securities for the appeal to

Dec. 1826.

Nesbit v. Brown.

this Court, are personally liable to the Plaintiffs, for the payment of the money above mentioned, and the Plaintiffs may, at their election, have execution against the Defendant and his sureties, or rely upon a sale of the land, &c. And let the said sum be held subject to be secured to the Plaintiff *Susan*, according to the directions of this Court—and retain the cause for such directions.

John Nesbit,
v.
John Brown, Ex'r of Hugh Montgomery. } From Rowan

A bill should contain only a statement of facts on which the Plaintiff's case is founded, not the evidence of those facts; therefore, when lapse of time forms no bar to the claim asserted, but only raises a presumption of *fact* inconsistent with it, the lapse need not be accounted for in the bill.

It seems, in such cases, that the lapse of time should be relied on, in the answer, as a defence.

When one sells the land of another, setting out the title of the latter, and covenanting against it, no estate passes by the deed, and a second vendee cannot sue at law, in his own name, on the covenants.

When a vendor covenanted, in case of eviction, to pay double the purchase money, and also all damages, held this to be a penalty, not stipulated damages, and the purchase money and interest only could be recovered.

The original bill was filed in 1803, and alleged that one *Andrew Cranston*, in February, 1758, conveyed to *Mary Montgomery*, the daughter of *Hugh Montgomery*, a lot in the town of Salisbury. That *Montgomery* and his wife, in April, 1762, in consideration of sixty pounds, conveyed the lot to one *William McConnell*, with covenant of quiet enjoyment, against the claim of *Mary*, and for further assurance from her, and also "that in case the said *Mary*, her heirs or assigns, should at any time thereafter enter into the said bargained premises, so as to dispossess the said *William*, his heirs or assigns, that the said *Hugh* and *Mary* his wife, their heirs or assigns,

should return and pay back double the purchase money with interest, and all damages that the said *William*, his heirs and assigns may suffer thereby." The bill then averred that *McConnell*, in August, 1762, conveyed the lot to the Plaintiff, who took possession thereof; that *Mary Montgomery* not only refused to assure the title of the Plaintiff, and had died without so doing; but that *Anthony Newman*, who intermarried with her, had by course of law, turned him out of possession. That *McConnell* died insolvent and without personal representatives, and that *Hugh Montgomery*, died in 1778, leaving the Defendant his executor. The bill prayed general relief, and that the Plaintiff might recover of the Defendant, the price of the lot.

The facts as set forth in the bill, were not varied either by the answer or the testimony; from the latter, it appeared incidentally, that the Plaintiff had sued at law upon the covenants in the deed to *McConnell*, and that the suit was decided against him as late as the year 1800. (Vide *Taylor's Reports* 82.)

Murphey and *Nash*, for the Plaintiff.

No Counsel appeared for the Defendant in this Court.

HENDERSON, Judge.—When this cause was first opened, I thought, that the great length of time which elapsed after the eviction, before the filing of this bill, formed a bar; but on reflection, I am satisfied that it does not. Lapse of time is matter of defence; and in cases such as this, where lapse of time is of itself no bar, but affords a presumption only, of a fact which is a bar, it is not cause for demurrer; but in cases where lapse of time of itself forms a bar, as in cases where the statute of limitations may be pleaded, then it is cause for demurrer, according to the late English decisions, recognised *arguendo*, in this Court, in the case of *Falls* v. *Torrance*, at the last term. For, as *Lord Thurlow* says, the bill should contain the facts, not the evidence; and the rea-

Dec. 1826.

Nesbit
vs.
Brown.

sons why a suit has not been sooner brought is evidence to repel the presumption of fact, which forms a bar, and which arises from such omission. The Defendant, if he intended to rely on the lapse of time as a ground of defence, should have insisted on it in his answer. The Plaintiff would then have been prepared to repel it, if he could, and the Defendant having omitted to make that defence, affords reason to believe, that if made, it could have been repelled.

The only other objection is, why did not the Plaintiff sue on his covenant at law? The answer is, that he could not sue in his own name, for in *Montgomery's* deed to *McConnell*, it is stated that the lot belonged to his daughter; and there being affirmation against affirmation, estoppel against estoppel, no estate passed to *McConnell* by the deed of bargain and sale. The covenants in the deed were therefore mere personal covenants with *McConnell*, not annexed to any estate, and did not pass to *Nesbit* by *McConnell's* deed to him, as was decided many years ago, at Salisbury, by the Chief-Justice, in an action brought on this very deed. (*Nesbit* v. *Montgomery's Ex'r. Taylor's Reports*, 82.)

Nesbit's only remedy, therefore, was in this Court, for *McConnell* became *Nesbit's* Trustee, as to those covenants, when he conveyed the land to him, and in equity, *Montgomery* was bound to fulfil them to him. As to the agreement to restore double the consideration in case of eviction, we must look upon that as a penalty only, if for no other reason, than the one that is expressed in the deed, to-wit, that *Montgomery* shall also pay, over and above double the consideration, all damages which *McConnell* mightsustain upon,or onaccount of an eviction. There is no pretence, therefore, to say, that the parties have agreed on a sum as liquidated damages, contrary to their express agreement; besides, liquidated damages are favored no where, and less in Courts of Equity than elsewhere.

Dec. 1826.

Nash v. Brown

The Master will therefore take an account of the principal and interest, from the time the consideration money was paid to the present time, making the sum mentioned in the deed the amount of principal, and adding 25 per cent. to equalize the proclamation money to our present currency. He will also take an account of assets in the hands of the Defendant. As great lapse of time has taken place, the Master may state any fact, which in his opinion, may tend to diminish the interest, or which the parties may desire; he will also deduct the war interest.

Taylor, Chief-Justice.—This Bill seeks to recover a compensation from the executors of *Montgomery*, for the breach of a covenant, contained in a deed made by him to *McConnell*, in the year 1762, for a lot of land in the town of Salisbury, which lot, *McConnell* afterwards sold to the present Complainant, who claims the benefit of the said covenants as assignee. A great lapse of time has taken place since a breach was committed, and the delay is not accounted for in the bill; but as this lapse is not relied upon in the answer, nor was insisted on at the hearing; and as the printed report of the cases at law between the same parties, upon the same covenant, compared with the time of filing this bill, shows that the Complainant has been engaged nearly the whole of the time since 1773, in asserting his right, and that he failed at law, because his legal title as assignee was imperfect, we may proceed at once, to a consideration of the case upon its real merits.

The covenant contained in *Montgomery's* deed, so far as it affects the question to be decided, is in these words, "and further, it is hereby covenanted, promised and agreed by the said parties hereunto, that in case the said *Mary Montgomery*, her heirs or assigns, shall at any time hereafter, enter into the hereby bargained premises, so as to dispossess the said *William McConnell*, his heirs

Dec. 1826.

Nesbit v. Brown.

or assigns, or break, determine or nullify, or make void the hereby bargained premises, that then the said *Hugh Montgomery* and *Mary* his wife, and their heirs or either of them, shall return and pay back double the purchase money with interest, and pay also for all damages, unto the said *William McConnell*, his heirs or assigns, whatsoever they may suffer thereby."

If the Complainant could have recovered at law, and no fixed sum had been agreed on in the deed, the measure of damages would have been the purchase money, viz. sixty pounds, with interest from the 25th of April, 1762; and if a recovery had been made according to the sum agreed upon in the deed, viz. double the purchase money and interest, I conceive a Court of Equity would have relieved upon payment of the first sum. Whatever difficulty there may be in ordinary cases to distinguish between a penalty and liquidated damages, the terms of the covenant have here clearly ascertained that sum to be a penalty: for double the purchase money is not to be repaid as the probable estimate of damage, *McConnell* or his assigns, might sustain by an eviction, but it is to be paid in addition to all damages. The parties have not therefore left it to inference or construction, but have fully expressed, that the sum is to be paid as a penalty upon *Montgomery*, for not performing his covenants.—Under this view, there must be a decree for the Complainant for the purchase money, with interest from the date of the deed, and the costs of the suit.

DECREE ACCORDINGLY.

Dec. 1828.

John Morehead
v
Eustice Hunt, Isaac Medley, Matthew Clay, Leonard Claibourn, Edward Pannell and Thos. Rawlings. } From Rockingham.

The employment by the vendor of bye-bidders, to enhance the price at an auction sale is a fraud, for which, equity will set aside the contract on a bill filed by the purchaser at such sale.

The bill alleged that Defendants purchased a tract of land lying in the County of Rockingham, on Dan River, on which they laid off a Town, to which they gave the name of Jackson, and divided the same into lots, that they advertised the sale of the lots in the Lynchburg Press, and in other printed advertisements, both in North Carolina and Virginia, in the month of March 1818, in which they stated that said town was at the head of navigation, that it possessed advantages which no other town on the Roanoke could possess, having immediately in its vicinity an inexhaustible bank of pit coal, an extensive quarry of excellent slate, and a number of excellent scites for mills and other water works. That *Hunt*, one of the partners, and agent of the others, represented to the Plaintiff, and induced him to believe, that the Company would erect a bridge across Dan River, at Jackson, that the President and Directors of the State Bank of North-Carolina, had promised the Company to establish an agency in the said town—that the Company had extensive funds, which they would employ in giving commercial importance to the place, and that most if not all these representations were made when the said *Hunt* and Plaintiff were alone, or when only some of the Company were present. That Plaintiff confiding in the representations made by the Company, in their advertisements and those made by *Hunt*, did on the 15th April 1818, at public auction, bid off three of said lots, to-wit, No. 22 at

Dec. 1826.

Morehead v. Hunt et. al.

$1305, and Nos. 30 & 50, at the sum of $875, amounting to the sum of $2180, for which he gave his bonds, payable in two annual instalments, the one payable 25th December 1818, the other 25th December 1819. The bill further alleged, that Plaintiff was informed, confidently believed, and expected satisfactorily to prove, that at the auction of said lots, when he had the said three lots cried off to him, that *Thomas Rawlings*, one of the Company, bid for six or eight lots, and that three or four were cried off to him, but whether he was actually a partner at that time or became so on the day of sale, he did not know. He had also been informed, believed, and expected to be able to prove satisfactorily, that the Company had many other bye-bidders or puffers, among whom was one *Paxton*, of Danville, Virginia, who bid several times against him. That the Plaintiff was unacquainted with the situation and advantages of said town, and that he purchased entirely upon the confidence which he had in the representations of the Company, in their printed advertisements, of their copartner and agent *Hunt*, and of the bye-bidders, believing them to have been honestly and *bona fide* made—but that most, if not all the material representations made by the Company, and by their copartner and agent *Hunt*, were untrue, that Jackson was not at the head of navigation, the river being equally susceptible of navigation for thirty miles higher, as it was to that place, that it possessed none of the advantages represented, that there is no coal whatever in the place or its vicinity yet discovered.

The bill then stated a recovery effected at law for the purchase money, and prayed that the Plaintiffs at law might be perpetually enjoined, &c.

The Defendants, by their answers, admitted the purchase by them of the scite of Jackson, the sale of the lots—that they had advertised as usual to give publicity—but they each denied, in substance, the fraudulent representations charged in the bill, and insisted that the

Plaintiff was better acquainted with the natural advantages of the scite and of the river, than they, and purchased upon his own judgment—but alleged the existence both of Coal and Slate in the vicinity of Jackson—they denied the employment of puffers, alleging that the purchases made by *Rawlings* were not for the benefit of the Company, and that *Paxton* was not employed to bid by them.

Proofs having been taken, and the cause set for hearing in the Court of Equity below, it was transmitted here.

The printed advertisement referred to in the bill stated,

That Jackson was situate opposite the Eagle Falls on Dan River, above which the River was not navigable, that it possessed advantages that no other town on the Roanoke could possess, being at the upper point of navigation, and having immediately in its vicinity an inexhaustible bank of excellent Pit Coal, and an extensive quarry of Slate, and the Eagle falls possessing many excellent scites for mills and other water works—that commercial houses were erecting for the transaction of business to a considerable extent, and that it was hoped or expected that a share of Bank Capital would be deposited there.

On the hearing, many depositions were read, of which the following alone are material:

Stokely F. Foster deposed, that he was upon terms of intimacy and familiarity with the Defendants—that sometime in the spring of the year 1818, most of the Defendants associated themselves together, and generally passed under the denomination of the "Jackson Company," each contributing to one common stock, the sum of $500 or $1000—they frequently made excursions up the Roanoke, for the purpose of fixing on a site for a town, and ultimately concluded to establish one at the "Eagle Falls on Roanoke, to be called Jackson. The motives

Dec. 1826.

Morehead v. Hunt et. al.

of the Company for selecting this location were made known to deponent, and were two—first, that the Company were interested in the town of Danville, Va. also on Roanoke, which was likely to suffer from the expected competition of "Leaksville," another town about to be erected near it, and from which they wished to direct public attention, by fixing it on Jackson—secondly, that they were actuated by considerations of a speculative nature. The deponent was employed by one of the Company to go to Lynchburg, Va. to advertise in the public papers the sale of lots, and to procure and post up hand bills, specifying the day of sale, and enumerating the advantages attending "Jackson"—among other things, those advertisement extravagantly asserted, that Jackson was well calculated as a repository for produce, and that it would eventually supercede Danville. This deponent frequently heard one of the Company boast of his great influence in gaining their project friends, and appeared particularly pleased that he had prevailed on the Plaintiff (*Morehead*) to enlist in their cause. That about the time the sale was advertised, one of the original Company (who is not a Defendant in this case, and who withdrew from the Company) expressed great dissatisfaction at the manner in which they were proceeding, and by so doing incurred the displeasure of most of them, so much so, that they were frequently heard to say that they were resolved to get clear of him, and finally effected their determination—his place was supplied by another, and the Company was increased by the accession of one or two, all of whom constitute the present Defendants. This deponent also said, that about the commencement of the sale of lots, the Company caused to be made a brilliant display of goods and groceries, which they had previously prepared and arranged on the spot, and that they kept boats continually plying and bugles continually winding on the river that flowed adjacent. That one of the Defendants said to this de-

ponent, "that their plans had taken so well, that even those who had determined not to buy, were alarmed for fear that they could not refrain from buying. The deponent further said, that he was not present at the sale of the first lot, but heard several of the defendants say, that it would go high, as an example by which the sale of the others might be governed—that when he went up where they were selling the second lot, he enquired who bought the first, and was told that it was purchased by *James Conner* for the sum of $700—it was also publicly said by Defendants, that *Conner* was purchasing for gentlemen in Lynchburg. Several of the Defendants also said, that lots were going too low, and that *Conner* had refused $1500 for the one purchased by him. Deponent also heard much about a Bank Agency, and in a reservation of certain lots, one was pointed out as being intended for a Bank. This deponent bought two lots, but was advised by one of the defendants not to buy any more, saying, "You know the Company and their plans as well as I do, and that they say a great deal more than they ought." One *John A. Sims* was very active, bid very frequently, was openly encouraged by the Defendants, and promised, that if he would be industrious, he should have a lot at his own price—a lot was afterwards cried out to him for $600, but he was permitted to take it at $250, for which sum only he executed his bond. In the course of the sale, several other lots were bid off by *Sims*, but he executed only one bond, as above mentioned. Some of the Company seemed much displeased at this, but others said that his services had been worth more to the Company than five lots. This witness further deposed, that since the sale, he heard one of the Company ridicule the surprising simplicity betrayed by the people, saying, that they were the most complete fools he had ever seen, that he had made them believe he was Christ himself, and had really induced old *Morehead* to think, that in one month the city of Nor-

Dec. 1826.

Morehead v. Hunt et al.

folk would be deserted by all its enterprising merchants, and that they would be transplanted in Jackson.

James Conners, who is mentioned in *Foster's* evidence, deposed, that he was authorised and requested by the Company to run the first lot as far as $1000—that it was cried out to him at $700—that he was not empowered to bid for any other persons than the Company—that he frequently heard the Company assert that he had been offered $1500 for the lot he bid off—that he had received no such offer; and that if he had, and the lot had been his, he should certainly have taken it. This deponent frequently heard the Company say, that they intended to invest a large amount of capital, and carry on an extensive business—that they were very active in persuading the people to buy—said they intended to erect several large merchant mills, &c. This deponent was well acquainted with all the Company, but one—that it was not known to any but the Company who he purchased the lots for in reality, until after the sale—that it was said by the Company publicly, that there was a plentiful supply of Pit Coal and Slate, convenient to Jackson—but that it is now generally said, and this deponent believed truly, that there is neither.

It was in evidence, that some of the Defendants represented that they had offered to *Mr. Galloway*, seventy five thousand dollars for a tract of land opposite to Jackson; this was contradicted by the deposition of *Mr. G.* It was also proved that Defendants asserted their intention to erect a bridge, and vest 80 or 100 thousand dollars of their capital at Jackson, to give commercial importance to the place, that one of the Company would reside there, and that they would stake their last shilling upon its prosperity. It was also clearly shewn that none of these things had been done.

It also appeared in evidence, that the river could be navigated for thirty miles above Jackson, but whether in small canoes only, or in larger craft, was not shewn.

On the part of the Defendants, depositions were read to impeach the general character of *Foster*, and others in reply to support him. The Defendants also proved that some coal and some slate had been found near Jackson, but the extent of the formation and its quality, did not appear. They also proved, that after the sale the Plaintiff several times expressed his satisfaction at his purchase and his resolution to abide by it, and that after his first bond fell due, upon being applied to for payment, he asked for indulgence and gave an order for the payment of it.

This cause was elaborately argued by *Gaston* and *Badger*, for the Plaintiff, and by *Seawell* and *Hogg*, for the Defendants.

In the course of the argument, the whole doctrine of deceitful representations and of puffing at auction sales, as affording grounds for relief at law and in equity, was very fully discussed, and the reported cases on the subject referred to and analized.

HALL, Judge.—When, a few years ago, the spirit of improving the internal navigation of the State, was excited, various were the calculations that were made as to the consequences which would flow from it.

When the Legislature became actuated by the same spirit, and passed many laws to facilitate its accomplishment, there were those who believed that the public agents or companies thereby established, with the means then in their power, could so far improve internal navigation, as to give an additional value to property, far beyond that at which it was then estimated; others were less sanguine.

A knowledge of engineering and the amount of funds necessary to success in such an important undertaking, was very limited. This state of things opened a grand door for speculation, and associations were formed for

Dec. 1826.

Morehead v. Hunt et. al.

entering into them, and like the Defendants, purchased up favorite spots of ground for the erection of towns and sold them out in lots, frequently for enormous prices, far beyond their value. And when the infatuation and delusion under which they were purchased subsided, the law could afford no redress to the purchasers, because the speculation was a fair one, and this remark is applicable to the present Complainant, if there was no fraud used in the sale, at which he purchased sufficient in equity to set the sale aside. Whether there was or not, it is next necessary to ascertain.

It must be kept in view, that the great object to be accomplished, was the removal of obstructions in the River Roanoke, and making it navigable; it was that only which could give value to towns or to lots—if it remained unnavigable, so as not to be the channel through which produce could be sent to market, the lands upon it whether laid off into towns or not, acquired no additional value—that was the grand pivot on which speculation turned; whether success attended the enterprize or not, did not depend upon the proprietors of towns or the purchasers of lots. The means intended for that end, and the power of directing them, were confided to the Roanoke Navigation Company: if the undertaking terminated successfully, towns and lots would be valuable, if otherwise, they would only retain their original value; in the latter case, the purchasers of lots would find themselves but illy compensated, by having bridges erected on the river, or in having coal mines or quarries of slate contiguous to it, or in having sites for manufactories upon it—no doubt if the river was navigable, these advantages would enhance the value of the lots, and taking it for granted that untrue representations were made of them at the sale, I cannot think that the contract for the purchase of the lots ought to be rescinded, because they would acquire their greatest value from the river being made navigable, and not from the

coal mines and other advantages before noticed; that the river is not navigable, is not the fault of the vendors.

If the case stopped here, I would say that the Complainant should be otherwise remedied, for the injury sustained by those misrepresentations, but that the sale on that account, ought not to be set aside.

There is another allegation in the bill of misrepresentation, that is that the town of Jackson was at the head of navigation. On this part of the case, the evidence is not satisfactory; it has been proved that the river above the town has been navigated a considerable distance, but whether in a light canoe or in what else, has not been stated. If it was sufficiently established, that the town was not at the head of navigation; and that the land on which it was laid off, was of little more, or no more value than other lands on the bank of the river in case the river was rendered navigable, I would say that the purchasers did not get that which they contracted for, and that, for that reason, the sale ought to be set aside.

Again, although Jackson lay below the head of navigation, yet if it possessed considerable commercial advantages, so that the lots bore some considerable proportion to the price given for them, the purchase, probably ought not to be set aside. When a case turns on considerations of this sort, all the circumstances attending it should be made out in evidence. It is useless to examine this part of the case any further, because there is another objection made to the sale of the lot, of more important concern to the vendors, which, I think, must decide the controversy, and that is, the employment of puffers to enhance the value of the lots at the sale.—This practice is forbidden by morality and fair dealing, and is condemned by the laws of the country, *Cowp.* 395, 6 *Term*, 642, and the apology cannot be alleged, that it was adopted as a defensive measure, (if such apology is admissible) to prevent the lots from selling for less than

Dec. 1828.

Morehead v. Hunt et. al.

they were worth. (3 *Ves.* 628.) They had made no experiment in selling any of them, when they employed *Conner*, to bid for the first lot that might be offered, to $1000, well knowing, that the price for which that would sell, would have a great effect in fixing a higher value upon others, in the estimation of those who might bid for them. It matters not, that it has not been proved that any puffer bid for those the Complainant purchased. The lots were as articles of the same kind, or as Complainant's Counsel has better expressed it, they were as yards of cloth of the same web: other circumstances of puffing have been proved. I think, for this cause, the sale should be set aside.

HENDERSON, Judge:—I deem it unnecessary to examine the grounds of relief founded on the alleged fraudulent representations as to the peculiar advantages of the Eagle Falls, as the scite for a town, for there are other grounds on which I am satisfied that this contract should be set aside. I mean the fraudulent employment of puffers at the sale. But I cannot forbear from observing, that the manner of making these representations has very much the appearance of a fraudulent combination of individuals, to give to their statements a credit, beyond what they knew to be commonly allowed to those of ordinary vendors, and by them, intended to stifle fair and full examination, and, as it were, by bold assertion, coming from four or five influential individuals, and, from their situation, supposed to possess great knowledge of the navigation, to overcome the judgments of the less confident, and less intelligent. I say, I think it has much the appearance of such premeditated design, but I pass it over, and come to the puffing, as a very plain ground of relief. I shall not discuss the question, whether puffing is a fraud *per se*, for it is agreed by all, (even by *Ld. Roslyn*, who held some very strange opinions, to say the least of them, as to the inoffensiveness of

puffing,) that it is allowable to prevent sacrifice, only, and not to procure an inflated price; and there is not the least pretence, that the object, in this case, was to prevent sacrifice, but the intent and effect was, to give this property a price far beyond its value, and this puffing was of the most fraudulent kind, for I consider not only the employment of *Conner* as puffing, but all that was said about his being employed to buy for some merchants in Lynchburg, the fraudulent offers made by some of the Company, of 1500 dollars for the lot; for asking him if he would take that sum, and saying that he had refused it, had the same effect, (and was so designed,) of severally offering it, to which may be adduced a species of puffing, calculated to produce the greatest effect, that *Galloway* had refused $75,000 for his land, on the opposite side of the river—nor can the Defendants protect themselves from the effects of their fraud, under the pretence, that at the time the lot in question was knocked off to the Complainants, that he was contending with real bidders, for the question was not as to the *relative* value of the lots, but the value of *a lot*, in the town; having fixed that, by their puffing, the cheated and deluded bidders might well be trusted to settle that matter, *the relative value*, among themselves, without the aid of bye-bidders. The rule laid down by the Complainant's Counsel, is certainly a wise one, that at the sale of a horse and an ox, puffing the sale of the horse, is not puffing the sale of the ox, because the bidding for the one, does not, in the estimation of the bidders, enhance the value of the other—but this is like the bidding for a yard of cloth—it enhances the price of each yard in the whole piece. The law makes no distinctions without a difference. *Morehead*, therefore, stands in the same situation as if he had been contending with puffers, and the last bid but his own, had been made by one of them: for in reality the bidders all became puffers, mere machines in the hands of these men, who, after having set them go-

Dec. 1826.

Morehead v. Hunt et al.

ing, might well retire from the work, and enjoy the spoils.

The contract must be set aside, and upon the Complainant reconveying, by a conveyance approved by the master, and deposited in this office, for the benefit of the Defendants, a perpetual injunction will issue. The defendants will pay all costs both at Law and in Equity.

TAYLOR, Chief-Justice, concurring.

DECREE ACCORDINGLY.